Mullican Lumber Company *and* International Brotherhood of Teamsters, Local Union No. 175, AFL–CIO. Case 11–CA–14718

March 25, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 16, 1992, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a brief in support of the judge's decision concerning the discharge of Patrick Garrett.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found that the Respondent unlawfully terminated Thomas Richards on September 13, 1991,[2] because he told some of the Respondent's managers on August 29 that he was a member of, and was going to be represented by attorneys from, the Teamsters, the Steelworkers, and the United Mine Workers, and that if he had to sue in court to get the Respondent to remove a particular disciplinary warning from his record, the Respondent managers would themselves be held ''personally liable,'' and also because Richards soon thereafter, in early September, told some of these same Respondent managers that he was going to be distributing union authorization cards.

In its defense, the Respondent asserts that its layoff of Richards on September 13 was occasioned by the completion of its final electrical installation project at which time it no longer needed a second electrician, as envisioned in a 1990 management decision to that effect. The Respondent states that this decision predated the union organizing campaign and therefore was unrelated to any protected or union activity, and further, that it selected Richards for layoff because of his lack of seniority vis-a-vis Carl Larue, the other electrician. We affirm the judge's rejection of the Respondent's asserted defense, and instead rely on the judge's following findings.

First the judge found that it was common knowledge that the Respondent's intention was to transfer rather than lay off any unneeded electrician to a production job when the rewiring and installation projects were completed and only one electrician was needed in the plant. Indeed, the record reveals that in 1987 then-Plant Manager John Robards told that to Richards[3] and in 1988 Robards assigned Richards to work on a knot saw during a hiatus in electrical installations.[4] Furthermore, the judge credited Larue's testimony that he was assigned to the work of finishing the electrical installation in the employee breakroom following Richards' termination on September 13.[5] It is therefore clear that when the Respondent told Richards on September 13 that his job was eliminated and he was laid off, the final electrical installation project was not yet completed.

The judge further found that the Respondent, who had never before laid anyone off, decided to lay Richards off only after he threatened on August 29 to hold Respondent managers personally liable in a possible lawsuit in which he would be represented by attorneys from three unions, and that the Respondent effectuated that layoff decision after Richards told Respondent managers in early September that he would be distributing union authorization cards. We note in this context that the Respondent did not give evening shift electrician Larue any advance notice that he was going to be the only electrician, and that he would thenceforth be working the day shift in place of Richards. Indeed, as the record reveals, it was not until the Monday morning following the Friday termination of Richards that the Respondent tracked down Larue at his home and told him to report immediately to work on the day shift. We find that this circumstance demonstrates the precipitate nature of Richards' termination, and further supports the judge's finding that the real reason why the Respondent terminated Richards was because of his recent announcement to the Re-

[1] The parties have excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions have been filed to the judge's finding that the Respondent's no-solicitation rule was unlawful or to his dismissing the allegation that the Respondent created the impression of surveillance.

[2] Unless otherwise indicated all dates are in 1991.

[3] Uncontradicted testimony by Richards shows that Robards assured him and Larue on numerous occasions that they would be placed in other jobs rather than be laid off because of lack of electrical work.

We do not view Operations Manager Steve Lafon's statement to Richards on August 26, to the effect that it would not make any sense to have two people on the payroll at the higher electrician rate if only one was doing the job, as a change from management's earlier-expressed policy of transferring any unneeded electrician to a production job.

[4] Thereafter, because of recurring machinery breakdowns, Robards assigned Richards as a troubleshooter on the day shift and Larue to machinery maintenance on the evening shift.

[5] Larue testified that in addition to completing the unfinished portion of the employee breakroom installation work, he was also required to install a ventilating fan that was added later to the breakroom project.

spondent of his plans to engage in union and protected concerted activity.

In sum, we find that the totality of the above circumstances belies the Respondent's assertion that Richards' layoff was simply part of an orderly plan to reduce the complement of electricians upon completion of the plant rehabilitation project. Rather, we infer from the pretextual nature of the reason for Richards' termination advanced by the Respondent that it was motivated by union animus and hostility towards Richards' anticipated exercise of his Section 7 rights.[6] We therefore conclude, in agreement with the judge,[7] that the Respondent terminated Richards in violation of Section 8(a)(1) and (3) of the Act.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Mullican Lumber Company, Ronceverte, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[6] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980); see *Whitesville Mill Service Co*., 307 NLRB 937 (1992).

[7] Chairman Stephens would conform the judge's violation finding and corresponding conclusion of law to the judge's factual findings and analysis by finding that the Respondent's initial decision on August 29 and its accelerated implementation of that decision on September 13 constitute discrete violations of Sec. 8(a)(3) and (1). Chairman Stephens finds that the layoff allegations of the complaint encompass the decision on which the layoff/termination was based and that both issues were fully litigated, and he further notes that this additional finding would not warrant any modification of the judge's recommended Order and notice.

[8] Because it is unclear whether Richards, absent his unlawful layoff, would have been retained as an electrician or transferred to a production job at the conclusion of all electrical installation work, we shall leave to the compliance stage of this proceeding the determination of the job to which Richards is entitled to reinstatement.

Jasper C. Brown, Jr., Esq., for the General Counsel.
Bruce A. Petesch, Esq. (Haynesworth, Baldwin, Johnson and Greaves, P.A.), of Raleigh, North Carolina, for the Respondent.
Russell Chandler, of Charleston, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Louisburg, West Virginia, on April 2, 1992. The charge which gave rise to this proceeding was filed by International Brotherhood of Teamsters, Local Union No. 175, AFL–CIO (the Union) against Mullican Lumber Company (Respondent) on November 1, 1991.[1] The charge was later amended on December 9 and 12. On December 13, a complaint and notice of hearing issued which alleges, inter alia, that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by creating the impression among its employees that their union activities were under surveillance; by promulgating a rule prohibiting solicitation on its property without authorization of Respondent; and by discharging Patrick Garrett and laying off Thomas Richards because of their activities on behalf of, or support for, the Union.

In its answer to the complaint, as amended at the trial, Respondent admitted certain allegations including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for General Counsel and Respondent both filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

I. JURISDICTION

Mullican Lumber Company is, and has been at all times material, a West Virginia corporation with a plant located at Ronceverte, West Virginia, where it is engaged in the manufacture of hardwood flooring. In the course and conduct of its business operations, Respondent annually sells and ships from its West Virginia facility products valued in excess of $50,000 directly to points located outside the State of West Virginia. Respondent also annually purchases and receives at its West Virginia facility goods and raw materials valued in excess of $50,000 directly from points outside the State of West Virginia.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

International Brotherhood of Teamsters, Local Union No. 175, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Initial Organizing Campaign and Changes in Work Rules*

Respondent operates a wood flooring plant at Ronceverte, West Virginia, where it employs fewer than 100 production and maintenance employees. Adjacent to the wood flooring plant, Respondent also operates a sawmill, but this is operated as a separate entity and is not involved in these proceedings.

In early May 1991, Respondent's employees began to organize among themselves to be represented by a union. Employee Patrick Garrett assumed a leading roll in making the initial contact with the Union and thereafter arranging meetings between employees and union representatives in May

[1] All dates herein refer to 1991 unless otherwise indicated.

and June. Garrett was assisted by other employees, including Thomas Richards. Respondent's personnel director, John DiLorenzo, acknowledged that Respondent became aware of the union activity in the plant in the early part of May. Operations Manager Steven Lafon admitted that when he became aware of the union campaign, he discussed the matter with owner Bill Mullican. All of Respondent's supervisors and managers, however, deny any knowledge of the identity of specific individuals involved in the union organizing campaign.

Sometime between mid-May and early June, Respondent held a meeting with employees where it acknowledged it knew about the union activity and announced various new work rules. In response to leading questions from counsel for General Counsel, two employee witnesses placed the meeting in ''late May.'' Operations manager Lafon placed the meeting on June 4, during which, according to Lafon, he or Manager of Human Resources Kaye Elmor read a statement regarding the Company's position concerning the Union. Elmor, however, placed the effective date of the new work rules, and therefore the meeting, in mid-May. The date, however, is really not critical and does not affect anyone's credibility. Lafon acknowledged that after becoming aware of the union campaign he discussed the matter with owner Bill Mullican, and they jointly agreed that Respondent should make a statement in response to the union activity. It was then that the meeting was held, and it was at the same meeting that new work rules were announced.

Regarding the Union, Lafon simply told employees that Respondent knew the Teamsters were trying to organize the plant, that Respondent did not feel employees needed any outside representation, and that if employees had any questions about the Union, or the signing of union cards, Respondent would be glad to answer those questions. Respondent then used the rest of the meeting explaining and discussing new work rules with employees. Counsel for General Counsel does not allege or contend that the announcement or imposition of these new work rules violated the Act, with the only exception being the specific no-solicitation rule which counsel for General Counsel alleges is overly broad.

In all, Respondent announced 36 new work rules, including a new no-smoking policy. Respondent had had a no-smoking policy for years, but at this meeting Respondent revised the penalty for smoking in nonsmoking areas from a ''B'' violation for which employees would receive a written warning to an ''A'' violation which could result in immediate discharge. During this meeting, Lafon and Elmor reviewed each of the revised work rules with employees.

Counsel for General Counsel argues that by Respondent telling employees it was aware the Union was trying to organize, it created the impression their union activities were under surveillance, and Respondent thereby violated Section 8(a)(1) of the Act. Counsel for General Counsel argues that merely by acknowledging to employees the Union was trying to organize employees, employees could ''reasonably assume'' that Respondent had placed their activities under surveillance. I find this argument so far-reaching as to be almost ludicrous. It is difficult to conceive of how an employer would begin a speech on the subject of a union campaign without acknowledging to employees that it knows union activity is ongoing. Simply by acknowledging to employees that it knows union activities are ongoing, without more, cannot be said to create the impression that those activities are under surveillance. See *Rood Industries*, 278 NLRB 160, 164 (1986).

One of the revised work rules instituted by Respondent prohibits ''solicitation of any kind without the approval of an authorized company representative.'' Violation of this rule subjects an employee to discipline up to and including discharge. On its face, the rule prohibits solicitation in the plant without qualification as to time or place. The Board has long held that an employer cannot lawfully require that employees secure permission prior to engaging in protected activities. A rule which requires authorization prior to solicitation concerning an organizing campaign in a nonwork area on nonwork time is presumptively unlawful. *Meadows East Inc*., 275 NLRB 1322 (1985); *St. Paul's Church*, 275 NLRB 1242, 1249 (1985). Respondent produced no evidence, extrinsic or otherwise, to rebut the presumptive invalidity of its overly broad no-solicitation rule. Accordingly, I find that promulgation and maintenance of this rule violates Section 8(a)(1) of the Act.

B. *June 13: Discharge of Patrick Garrett*

Patrick Garrett worked for Respondent as a production employee for 4 years prior to his discharge on June 13. Garrett worked in the nesting department on the first shift under the supervision of Doug Sprouse. As mentioned earlier, Garrett made the initial contact with Teamsters union representatives. Thereafter, he solicited employees to support the Union and made arrangements for meetings between union representatives and employees. There is no clear evidence, however, that Respondent was specifically aware of Garrett's union activities.

As evidence that Respondent must have been aware of Garrett's union activity, counsel for General Counsel points to four separate incidents. On one occasion in late May, a fellow employee repeatedly asked Garrett in a loud voice about an upcoming union meeting while a supervisor was approximately 15 to 20 feet away. Although the supervisor testified before me, he was not asked about and therefore did not deny having overheard the conversation. On another occasion in late May, Garrett was talking with a group of employees, including Tom Richards, while Plant Manager Bobby Kennedy and a supervisor walked by within 10 feet of the group. Neither the supervisor nor Kennedy, however, said anything to the group of employees to suggest they overheard the conversation. On yet another occasion, Garrett and two other employees were discussing the Union when they observed Plant Manager Kennedy within 2 or 3 feet of the group. Again, Kennedy said nothing to suggest he was aware of the conversation. Concerning a fourth incident, Garrett testified that on one occasion in early June in the employee breakroom, he reached in his billfold for money and a union authorization card inadvertently fell onto the floor between him and Supervisor Doug Sprouse. Garrett reached down, picked up the card, and put it back in his billfold. Garrett was not able to say with any certainty that Sprouse saw the authorization card. Sprouse apparently said nothing to suggest that he had seen the card. Based on these four incidents, and the fact that Respondent employees fewer than 100 production and maintenance employees, counsel for General Counsel seeks to employ the ''small plant doctrine'' to conclude that Respondent must have been aware of Gar-

rett's union activities. While I think it is likely that at least some supervisor or supervisors were aware of Garrett's union sentiments and union activities, I am persuaded, for reasons described more fully below, that Garrett's discharge was not the result of those union activities and that Garrett would have been discharged on June 13 whether or not he had been engaged in union activity.

During the morning on June 13, the flooring plant's dust collection system broke down, resulting in a cloud of dust particles throughout the plant. Maintenance Foreman Leon Spencer, Operations Manager Lafon, and Plant Manager Bobby Kennedy all worked on repairing the collectors. Repairing the system took several hours. At one point during the repairs, employee Patrick Garrett gathered with 8 to 10 other employees near the back door to the plant trying to avoid the dust that had accumulated throughout the plant. Garrett admits that during this discussion with other employees, he lit and smoked a cigarette.

Garrett testified that during the conversation, he jumped down from the dock area so that he was then technically outside the plant, and smoked a cigarette. According to Garrett, he then climbed back up onto the dock area, engaged in more conversation with fellow employees, then jumped back down onto the ground adjacent to the dock, and lit another cigarette. Garrett admits that before completing the second cigarette, he climbed back up onto the edge of the dock and sat there with his feet hanging over the edge. According to Garrett, as he smoked the second cigarette, Supervisor Leon Spencer approached him from behind and told him to get outside with the cigarette. Garrett responded that he was outside, but he then jumped down from the dock to the ground where he completed the cigarette. According to Garrett, on completing the second cigarette, he returned to work.

Garrett admits there had been a no-smoking policy at Respondent's plant for years. Nevertheless, Garrett testified that he did not see a no-smoking sign posted in the dock area on or before June 13. Other employees also testified that they did not recall seeing a no-smoking sign in the dock area, although they were aware of a no-smoking policy. One employee, Robert Bragg, actually testified that Respondent put up the no-smoking sign in the dock area 2 months after Garrett's discharge, but I do not credit this claim.

Supervisor Leon Spencer testified that as he was helping to repair the dust collectors, he needed a crescent wrench. Spencer walked through the plant to the shop, got the wrench, and headed back toward the collectors by way of the shipping area. Spencer testified that as he was walking back he came upon Garrett, still 15 or 20 feet inside the plant, with a lighted cigarette in his mouth. According to Spencer, he told Garrett that he knew better than to smoke in the plant, Garrett responded by immediately moving to the dock area where he sat down with his feet inside the door to the dock. On cross-examination, Spencer stated that Garrett sat down on the dock with his feet hanging outside the dock. Spencer stated that he continued on through the plant because he was in a hurry. When he got back to the area where the dust collectors were being worked on, Spencer told Plant Manager Kennedy what had just taken place.

Plant Manager Kennedy told Operations Manager Lafon about the incident. Lafon, Kennedy, and Spencer later reviewed what had happened, and informed Personnel Manager DiLorenzo. Together they decided that some action should be taken against Garrett, and that Garrett should be terminated. Together, they telephoned the manager of human resources, Elmor, at Respondent's headquarters. As Operations Manager Lafon testified:

> We talked about [it] and felt that there really was nothing we could do other than terminate him. We had already had a couple of meetings involving the smoking policy. We felt like if we didn't [do] something in this case then there was no way we were ever going to have a smoking policy. If you had let this one go with a warning or anything else, you would not have had a smoking policy, because it could not have been a more hazardous condition and it could not have been more obvious. . . . So we then called Kaye, who was in the Merryville office, talked to her and told her the circumstances around it. She agreed that we didn't have any choice but to terminate.

Later in the afternoon of June 13, Garrett was summoned to a meeting with Kennedy, DiLorenzo, Sprouse, and Spencer. Kennedy stated that Spencer had observed Garrett walking around in the plant with a lit cigarette. Kennedy asked Garrett if that was true, and Garrett denied it was true. Spencer then said that Garrett knew it was true, but again Garrett denied the accusation. Kennedy read a statement made by Spencer and asked Garrett to sign it, but Garrett refused to do so. Kennedy told Garrett that he was being discharged.

There is considerable discrepancy between the testimony of Garrett and that of Maintenance Foreman Spencer about where Garrett was while he was smoking. Garrett claims he was no further inside the plant than sitting on the shipping dock with his feet dangling outside. Spencer claims he first met Garrett 15 or 20 feet inside the plant. The evidence here strongly suggests that as is often the case, the truth lies somewhere in between. Employee George McMahan, called as a witness by counsel for General Counsel, testified that he observed Garrett smoking in the dock area standing just outside the dock door on the ground. Employee Robert Bragg, also called as a witness by counsel for General Counsel, testified that he observed Garrett sitting on the loading dock with his feet dangling outside while smoking the cigarette. Employee Marvin Miller, however, called as a witness by Respondent, testified just as credibly that he saw Garrett standing in the doorway of the plant smoking the cigarette. While I do not credit Spencer that Garrett was 20 feet, or even 15 feet inside the plant, I find even by Garrett's own admission that he was in the plant, whether sitting or standing in or near the doorway, smoking the lighted cigarette on September 13 while the dust collection system in the plant was broken down. I also find that the entire plant, including the shipping area, both inside and outside the doorway, is a posted no-smoking area. Every employee witness called admitted being aware of a no-smoking policy. Respondent submitted a photograph of the dock area where Garrett was smoking. While certain of the employee witnesses called by counsel for General Counsel complained that the photograph does not properly depict the shipping area on June 13, I credit Spencer that the photograph was taken on the same day as Garrett's discharge. The presence of barrels containing chemicals is not the significant feature of the photograph. Rather, the photograph clearly shows a no-smoking sign

posted in this area. I have every reason to believe, and no reason to doubt, that all employees understood the no-smoking policy to extend to every area of the plant, including the shipping area. Even Garrett's testimony suggests an awareness of this, since he was so careful to place himself either on the ground just outside the door or barely inside the plant sitting on the loading dock.

Counsel for General Counsel also introduced some evidence from which he argues that disparate treatment was accorded Garrett over other employees. Careful analysis of the evidence, however, suggests consistency rather than disparity, particularly when one takes into account the different circumstances involved. Employee Jerry Quick testified that in the past he has smoked cigarettes in Respondent's plant as often as 30 times per week and that he was observed by supervisors on at least 10 occasions. That part of his testimony I found extremely exaggerated. Elsewhere, Quick testified that he had been caught smoking in the plant by supervisors between 5 and 10 times and had not been disciplined or discharged. Even that part of his testimony I found somewhat exaggerated. Quick testified that Foreman Spencer had even admonished him about smoking in the plant during 1991 and had told Quick to put out the cigarette before Plant Manager Kennedy caught him. I credit Quick to the limited extent that I find he has smoked on occasion in the plant in the past and that on occasion he was even caught by supervisors doing so. While not reprimanded or discharged, Quick was admonished and told to immediately put out the cigarette. All of this occurred before the no-smoking ban was elevated from a category ''B'' violation to a category ''A'' violation, calling for more severe punishment, up to and including discharge for the first violation.

At the same time that Respondent was announcing the stiffened penalty for smoking, Quick returned to work from an extended absence. Shortly after his return, and shortly before Garrett's discharge, Quick was caught smoking outside the plant in the ''ramp area'' also covered by the smoking ban. When Supervisor Doug Sprouse caught Quick, he gave Quick a written warning. When Human Resources Manager Elmor learned that Quick had only been issued a warning, Sprouse himself was reprimanded for not enforcing the rule. At Elmor's direction, Sprouse met with Quick the following day and explained that the situation had been mishandled. Sprouse stated however that because it was he who made the mistake, Respondent was going to let it stand as a written warning. At the same time, Sprouse told Quick that if he was ever again caught smoking in a prohibited area, he would be terminated.

Rather than evidencing disparate treatment, the situation involving Quick reflects a certain consistency by Respondent. Quick's situation clearly shows that Respondent placed a new emphasis on enforcing its smoking ban during May and June 1991, apparently for reasons unrelated to the Union. Shortly after upgrading its smoking ban from a category ''B'' violation to a category ''A'' violation calling for a penalty up to and including discharge. Employee Quick was caught smoking. When Quick's supervisor issued him a reprimand rather than terminating him, Quick's supervisor was himself reprimanded, and Quick was told that he would be discharged the next time he was caught smoking. Shortly thereafter, Garrett was caught smoking. Unlike Quick, who was clearly outside the plant, Garrett was caught sitting just inside the plant at or near the door in the loading dock. Even more significant, however, is the fact that Garrett was caught smoking at the very moment that the entire plant was shut down due to a breakdown in the dust collection system which resulted in a cloud of dust particles throughout the plant. The danger of this situation simply cannot be ignored, and was obviously considered by Respondent in making the decision to discharge Garrett. As Lafon testified, ''if you had let this one go with a warning or anything else, you would not have had a smoking policy, because it could not have been a more hazardous condition and it could not have been more obvious.'' I conclude that Garrett's discharge resulted solely from the fact that he was caught smoking in a prohibited area on a day when Respondent was suffering from a breakdown of its dust collection system which resulted in extremely dangerous conditions. I find that Garrett's discharge was unrelated to his activities on behalf of, or support for, the Union, and I shall dismiss that allegation from the complaint.

C. *September 13: Layoff/Termination of Thomas Richards*

Thomas Richards worked as an electrician in and about Respondent's flooring plant from 1987 until September 13, 1991. Beginning in May, Richards and several other employees became active in the union campaign along with Garrett. While Garrett was the most active employee until his termination on June 13, Richards also carried union authorization cards with him at work and solicited various employees to sign cards on behalf of the Union. There is some evidence that Respondent was aware of Richards' union sentiments prior to September 1991. After Garrett was discharged in June, Garrett filed for unemployment compensation. A hearing was held to determine Garrett's eligibility for unemployment compensation, and Richards testified at the unemployment compensation hearing on Garrett's behalf. Also in late June 1991, Richards had a brief conversation with Respondent's owner Bill Mullican relating to Garrett. According to Richards' uncontradicted testimony, which I credit, on June 27, Richards observed a truckdriver who was smoking near the loading dock in the plant. From the context of Richards' comment it is apparent that this truckdriver was not employed by Respondent. Richards told Mullican, who was standing nearby, that Mullican did not believe in giving a man a fair shake. Richards continued by telling Mullican, ''You're letting that man do exactly what you let one of our workers go for.'' Mullican replied that he would ''take care of it.''

On August 26, an incident occurred which neither party spends much time discussing in their posttrial brief, but which I believe was instrumental in the decision to terminate Richards. On that day there was a breakdown in the conveyer belt used in Respondent's production system. Richards was working elsewhere in the plant. Consequently, Supervisor Leon Spencer and maintenance man Randy Kisemore took it upon themselves to repair the conveyer system. In doing so, one of them accidently dropped a steel cover onto electrical wires, which pierced and therefore shorted the wires. When Spencer thought he was done repairing the conveyer system, and turned on the system, the electrical circuit breaker immediately tripped or released due to the short in the wires. Only then did Spencer seek out Richards' help.

Richards spent approximately 15 minutes reviewing and analyzing the work which had been done by Spencer before it was discovered that the circuit breaker had tripped due to the shorted wires. Later that same day, Richards was called into a meeting with Spencer, Lafon, and DiLorenzo where he was given a written warning for taking 15 minutes to troubleshoot this tripped circuit breaker. Richards protested receiving this warning. On the following day, Richards again protested receiving the written warning to Spencer. When his protest fell on deaf ears, Richards protested further to Human Resources Manager Elmor, as described below.

During the meeting on August 26, Richards objected in part to receiving this written warning by stating that he had never been hired as a troubleshooter. Richards stated that he had been hired initially to help with installation of wiring, and that he then expected to be transferred to a production job at the same rate of pay. Lafon asked Richards if he was saying that if Respondent transferred him to a production job and assigned someone else to the electrician job with troubleshooting responsibilities that Richards should continue to receive the higher electrician wage rate. Richards told Lafon that was his understanding. Lafon told Richards it would not make any sense to have two people on the payroll at the higher rate if only one was doing the job.

After receiving the written warning on August 26, on August 29 Richards met with Elmor, Spencer, Lafon, and DiLorenzo. I rely on Respondent's own exhibit concerning what took place at this meeting. Richards began the meeting by telling Respondent that he was a member of the Teamsters Union, Steelworkers Union, and United Mine Workers of America. Richards then stated that their lawyers were going to represent Richards. Richards asked that the written warning be removed from his record. It is not clear which of the supervisors present spoke on behalf of Respondent, but whoever it was told Richards it was okay if he was a member of those unions, but that the unions did not represent Respondent's employees. Respondent also told Richards they would not remove the discipline from his record. Richards stated that it was important the discipline be removed because it might prevent him from getting another job due to a bad reference. Richards was assured that no prospective employer would be told about the warning, but that it was not going to be removed. Richards then stated that he did not hold anything against Respondent but that he was holding Spencer, Lafon, and DiLorenzo ''personally liable,'' pointing at each of them individually. Richards then made the statement that if it came down to taking it to court, the three would be held personally liable. Richards again insisted that the written warning be removed from his record. Finally, Elmor stated that the discipline would not be removed, but that it would not be given out in a reference, and there was no need to discuss the matter further. The meeting then ended.

In early September, soon after the meeting with Elmor on August 29, Richards asked for a meeting with Lafon and Spencer. Richards asked fellow employee Carl Larue to attend the meeting as a witness. The meeting was brief. Richards simply informed Lafon and Spencer, ''I am going to be passing out union cards.'' Lafon told Richards that he had the right to do this, but asked Richards if he was aware that Respondent believed employees did not need outside representation. Richards said he was aware of Respondent's position. The meeting ended.

On September 13, Richards was called into a brief meeting with LaFon, DiLorenzo, and Spencer. Spencer told Richards that his job was being eliminated and that Richards was being laid off. Richards did not reply, and simply walked out of the meeting.

Respondent argues that Richards' layoff was precipitated by a reduction of work and that Richards was chosen for the layoff because he was the less senior of two electricians. Respondent admits that it had never before laid anyone off and that the decision to lay off Richards was not made until late August or early September 1991. These two facts are very significant. Nevertheless, Respondent argues that a layoff had long been anticipated, that the need for two electricians was recognized by everyone as only temporary, and that by the beginning of September electrical work had been completed so that a layoff was appropriate at that time. Respondent's position is partially supported by the record. Richards was hired in 1987 at a time when Respondent was undertaking extensive wiring projects, including installation of new wiring, installation of new machines, and rewiring of existing facilities. Richards is a licensed master electrician. Prior to coming to work for Respondent, Richards was employed in the coal mining industry as an electrician for 32 years. Richards was first assigned to install new machines in the flooring plant. Carl Larue, who already worked for Respondent before Richards was hired, was assigned to assist Richards. Together Richards and Larue removed numerous pieces of existing equipment and installed new equipment. Larue was not and is not a licensed electrician, and there is no doubt that he learned much from Richards.

The records supports a conclusion that it was common knowledge, known too by Richards and Larue, that when the rewiring and installation projects were completed, Respondent would need only one electrician in the plant. It is equally clear, however, that Richards believed, and had been led to believe by Respondent, that when only one electrician was needed, the other would be transferred to a production job. Further, the records supports a conclusion that wiring of the employee breakroom was generally considered to be the last project to require two employees. There is conflicting testimony about whether wiring of the breakroom was completed when Richards was laid off. I believe the record supports a conclusion that the vast majority of wiring had been completed, but that not all of the electrical work on the breakroom was complete when Richards was laid off. Employee Larue, who continued as the sole electrician after Richards was let go, testified that he completed the work on the breakroom after Richards left.

The record as a whole paints a very clear picture about Richards' layoff/termination. Richards was hired in 1987 at a time when Respondent looked forward to extensive and sophisticated replacement and installation of wiring. Richards was a licensed master electrician who not only performed this rewiring and installation well, but who taught fellow employee Larue all or most of the skills necessary for work at Respondent's facility on a day-to-day basis. Richards became active in the union campaign. On August 26, Richards received a written reprimand. Whether that reprimand was justified or not, Richards vigorously protested receiving the written reprimand, first to local plant officials and then on

August 29 in a meeting with Director of Human Resources Kaye Elmor. In the August 29 meeting, Richards informed Elmor and other supervisors that he was a member of the Teamsters, Steelworkers, and Mine Workers Unions and that their lawyers were going to represent Richards. When Richards was told that it was okay that he was a member of these unions but that they did not represent Respondent's employees, Richards stated he did not hold anything against the Company but that he was holding LaFon, Spencer, and DiLorenzo ''personally liable.'' Richards added that if it came down to taking it to court, these three people would be ''held liable.'' As Elmor admitted, it was late August or early September that Respondent decided to lay off Richards. The conclusion is inescapable that when Richards threatened to sue LaFon, Spencer, and DiLorenzo, they along with Elmor hastily decided to terminate Richards. Richards' notice to Respondent in early September that he was soliciting other employees on behalf of the Union was simply confirmation or affirmation of his seriousness about the Union. Since electrical installation work was essentially completed, Respondent decided it would be easy to lay off Richards then and not transfer him to another position, and this is exactly what it did.

There can be no question that Richards' comments on August 29 were protected activity. In the plant, in a meeting with supervisors over a work-related reprimand which had been issued to him, Richards repeatedly threatened with the help of three unions to bring suit personally against his supervisor, the personnel manager, and the operations manager. Almost immediately thereafter these same people decided to lay off Richards although no employee had ever been laid off before. A few days later Richards affirmed his involvement with the Union by formally notifying Respondent that he was soliciting other employes' signatures on authorization cards. I wholly agree with Respondent that by then the die had been cast, but I find that it had been cast by his threat to sue and hold supervisors ''personally liable,'' not by Respondent's diminution of electrical work. Richards' formal notification to Respondent that he was soliciting other employees' signatures on authorization cards appears to have merely accelerated the decision which had already been made. Even before work on the employee breakroom was complete, Respondent acted as swiftly as possible to ''lay off,'' i.e., terminate Richards. I find that Richards' termination was precipitated by his protected union activity, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.[2]

CONCLUSIONS OF LAW

1. Respondent Mullican Lumber Company is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Local Union No. 175, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not create an impression among its employees that their union activities were under surveillance, and that allegation shall be dismissed.

4. Respondent promulgated and published a no-solicitation rule prohibiting solicitation of any kind without the approval of Respondent, and Respondent thereby violated Section 8(a)(1) of the Act.

5. Respondent discharged Patrick Garrett because Garrett violated its no-smoking policy in a particularly dangerous situation and not because of Garrett's union activities or sentiments, and that allegation in the complaint is therefore dismissed.

6. Respondent laid off/terminated Thomas Richards because of Richards' activities on behalf of, or support for, the Union, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

7. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Mullican Lumber Company, Ronceverte, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and publishing a rule which prohibits employees from engaging in any kind of solicitation without prior approval of Respondent's representative.

(b) Discharging employees because of their activities on behalf of, or support for, International Brotherhood of Teamsters, Local Union No. 175, AFL–CIO or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw, remove, and expunge from its work rules the rule which prohibits employees from engaging in any

[2] In making this finding, I obviously reject the *Wright Line* argument that Richards would have been laid off/terminated regardless of his union activity. This is the entire essence of Respondent's position here. As I have found, the evidence supports a conclusion that if it were not for Richards' union activity, he would have been retained and not laid off/terminated. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

kind of solicitation without prior approval of Respondent's representative.

(b) Offer immediate and full reinstatement to Thomas Richards to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(c) Make whole Thomas Richards for any loss of earnings or other benefits he might have suffered by reason of the discrimination against him by paying him a sum of money equal to the amount he normally would have earned from the date of the discrimination to the date of Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner proscribed in *F. W. Woolworth, Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

(d) Expunge from its files any reference to the discharge of Thomas Richards and notify him in writing that this has been done, and evidence of the unlawful action against will not be used as a basis for future personnel actions against him.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Ronceverte, West Virginia facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6624.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or enforce a rule which prohibits employees from engaging in any kind of solicitation without prior approval of Company representative.

WE WILL NOT discharge employees because of their activities on behalf of, or support for International Brotherhood of Teamsters, Local Union No. 175, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL withdraw, remove, and expunge from our work rules the rule which prohibits employees from engaging in any kind of solicitation without prior approval of our representative.

WE WILL offer immediate and full reinstatement to Thomas Richards to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

WE WILL make whole Thomas Richards for any loss of earnings or other benefits he might have suffered by reason of the discrimination against him by paying him a sum of money equal to the amount he normally would have earned from the date of the discrimination to the date of our offer of reinstatement, less net interim earnings, with appropriate interest.

WE WILL expunge from our files any reference to the discharge of Thomas Richards and notify him in writing that this has been done, and evidence of the unlawful action against him will not be used as a basis for future personnel actions against him.

MULLICAN LUMBER COMPANY